

IN INTEREST ARBITRATION PURSUANT TO SECTION 1111

OF THE SAN JOSE CITY CHARTER

In The Matter of Interest Arbitration
Between

CITY OF SAN JOSE

Employer,

and

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS LOCAL 230

Association.

JAMS REF# 11100016479

**DECISION AND AWARD OF
ARBITRATION BOARD**

Judicial Arbitration Mediation Services
(JAMS)

Before: Hon. Catherine Gallagher (Ret.),
Chair and Neutral Board Member

Alex Gurza, City Board Member

Joel Phelan, IAFF Board Member

Hearing Date: May 13, 2014

INTRODUCTION

The arbitration involving the City of San Jose and the International Association of Firefighters, Local 230 was held on May 13, 2014. The arbitrators were the Honorable Catherine A Gallagher (ret.), neutral Board Member; Alex Gurza, City Board Member; and Joel Phelan, International Association of Firefighter ("IAFF") Board Member. There was half-day hearing followed by post hearing briefs simultaneously submitted on July 21, 2014 and reply briefs on August 11, 2014. On August 13, 2014, the City objected to the Arbitration Panel's consideration of two August 2014 memos from San Jose Council Member Don Rocha to the Mayor and City Council.

The arbitrators met on September 8, 2014 to discuss the matter. Pursuant to San Jose Charter Section 1111, the Arbitration Board decides each issue presented separately, by majority vote.

The International Association of Firefighters, Local 230 ("Union" or "IAFF, Local 230") is the exclusive bargaining representative for the San Jose Fire Department personnel employed in the ranks of firefighter, fire engineer, fire inspector, arson investigator, fire captain and fire battalion chief. Christopher E. Platten, Esq. of Wylie, Blunt, Platten & Renner represented the Union. David Kahn, Esq. and Burke Dunphy, Esq. of Renne, Sloan, Holtzman, Sakai LLP represented the City of San Jose ("City").

BACKGROUND

In November 2010, City of San Jose voters approved an amendment of the City Charter through Measure V, now incorporated as Section 1111 of the San Jose

City Charter. The amendment sets forth the parameters for the City's interest arbitrations. Section 1111 standards are applicable when the City and one of the unions representing San Jose City employees are unable to reach a negotiated agreement on terms for a Memorandum of Agreement. An Arbitration Board is appointed to make a decision for the parties. Charter Section 1111 places a number of limits on an Arbitration Board award. It provides that strikes by firefighters and police are not in the public interest and should be prohibited, and that both sides to the controversy must negotiate in good faith. If good faith negotiations are at an impasse, then the issues are to be submitted to a three- member Board of Arbitrators.

At the end of the Arbitration, the parties are to submit a last offer of settlement on each of the issues in dispute. The Arbitrators are to determine which last offer most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, including changes in the average consumer price index, the wages, hours and other terms and conditions of similarly employed personnel and the financial condition of the City and its ability to meet the cost of the award.

Charter Section 1111(f) provides that:

In all arbitration proceedings conducted pursuant to this section, the primary factors in decisions regarding compensation shall be the City's financial condition, and, in addition, its ability to pay for employee compensation from on-going revenues without reducing City services. No arbitration award may be issued unless a majority of the Arbitration Board determines, based on a fair and thorough review of the City's financial condition and a cost analysis of the parties' last offers, that the City can meet the cost of the award from

on-going revenues without reducing City services. The arbitrators shall also consider and give substantial weight to the rate of increase or decrease of compensation approved by the City Council for other bargaining units.

And the Arbitration Board's award is also legally constrained by the definition of compensation in Charter Section 1111(f):

"Compensation" shall mean all costs to the City, whether new or ongoing, for salary paid and benefits provided to employees, including but not limited to wages, special pay, premium pay, incentive pay, pension, retiree medical coverage, employee medical and dental coverage, other insurance provided by the City, vacation, holidays, and other paid time off.

The Board is required to follow these Charter standards and, if it fails to do so, a party would be entitled to seek a Writ of Mandate from the Superior Court to set aside the Board's Decision and Award in violation of Section 1111(h). "A city's charter is, of course, the equivalent of a local constitution. It is the supreme organic law of the city... Within its scope, such a charter is to the city what the state Constitution is to the state." *Creighton v. City of Santa Monica* (1984), 160 Cal.App.3d 1011, 1017.

Also in November 2010, San Jose City voters approved Measure W approving an amendment to adopt new retirement plans for new employees, commonly called "Tier 2" retirement benefit plan for new employees. In early 2011 the San Jose City Manager provided recommendations for labor negotiations covering Tier 2 employees. In her memorandum to the Mayor and City Council, the City Manager explained that the retirement benefit is the most expensive benefit provided to City employees and there was a 359% increase in police and fire retirement benefits between 2000 and 2011, from \$23,644,890 in 2000-2001 to \$108,467,650 in 2011-

2012.

In June of 2012, San José voters passed "The Sustainable Retirement Benefits and Compensation Act," otherwise known as Measure B ("Charter Article XV-A"). Charter Article XV-A mandates that the City of San Jose adopt a Tier 2 retirement benefit for all new employees, including firefighters, and established a number of maximum benefit levels for all City Tier 2 members.

As a result of the June 2012, election Sections 1501-A through 1515-A of the City Charter govern post-employment benefits. Section 1503-A requires the City Council to adopt ordinances implementing the Charter provisions, and Section 1508-A establishes Charter-mandated maximums for certain categories of Tier 2 retirement benefits. For IAFF Local 230, applicable limitations in Section 1508-A are:

- Retirement age of 60, or 50 with actuarially reduced benefit.
- Cost of Living Adjustments ("COLAs") shall not exceed an annual cap of 1.5% based on the Consumer Price Index (the "CPI").
- Final compensation average of highest three consecutive years of base pay only.
- Retirement benefit accrual at a rate not exceeding 2% per year of service, with a maximum of 65% of final compensation.
- For a defined benefit plan, a service year is 2080 hours worked, including paid leave but not including overtime.
- Employees who leave City service and are rehired or reinstated shall be placed into Tier 2. If the employee has at least 10 years of service credit prior to separation, then the accrual rate for service years prior to separation will be preserved at the Tier 1 level.

Section 1504-A further limits the City Council and the Arbitration Board's authority by specifically prohibiting any increase in pension and/or retiree

healthcare benefits without voter approval. It does permit the City Council to adopt Tier 2 pension benefits within the limits set forth above.

On September 12, 2012, the City provided the Union with its proposal containing the maximum benefits allowed under the Charter section 1508-A according to the City. Negotiations were protracted. There are eleven bargaining units representing the employees of San Jose. The International Association of Firefighters Local 230 ("IAFF Local 230") is the last bargaining group in the City that does not have a Tier 2 retirement benefit plan.

In 2012 the City of San Jose brought a Petition for Writ of Mandate and a Petition to Compel Arbitration in Santa Clara County Superior Court. Judge Kevin McKenney heard the matter. On June 17, 2013, the parties were ordered to proceed to interest arbitration. Judge McKenney's decision reflects that the parties previously engaged in thirteen negotiation sessions and at least two mediations on the issues.

The Union asked Judge McKenney to direct the arbitrators to consider a proposal regarding increased Tier 2 pension and retirement benefits since the scope of the Arbitration Board's authority is resolved by petition to the Superior Court. Judge McKenney declined to direct the arbitrators to consider such proposals, indicating that the request was contrary to the express provisions of 1504-A of the City Charter. The Charter provides that any increases in pension or retiree healthcare benefits had to be approved by the voters of the City of San Jose.

In a separate proceeding, the Union challenged the ballot measure resulting in the Tier 2 Charter provisions with the Public Employment Relations Board

("PERB"). This parallel proceeding questions the legality of Measure B by asserting that the City failed to comply with its obligations to bargain in good faith prior to placing the measure before the voters. If the Union succeeds before PERB, it believes that interest arbitration will be moot and filed a cross petition in Superior Court to stay this interest arbitration proceeding. In the June 17, 2013 decision, Judge McKenney denied the request to stay the interest arbitration until after a decision by the PERB. The Union expressly reserved all issues arising from its PERB complaint, indicating that PERB, and not the Arbitrators, has jurisdiction over those issues.

In addition, the Union pointed out that in September 2012 the California legislature adopted the "California Public Employees' Pension Reform Act of 2013" or "PEPRA". It creates lower benefits for newly hired firefighters first employed after January 1, 2012 in certain areas of California. PEPRA establishes the labor market conditions for pension benefits for newly hired fire fighters for the vast majority of public agencies within California. The Union asserts that San Jose Tier 2 benefits are inferior to similar benefits in PEPRA. The City argues that this standard is irrelevant as PEPRA is significantly unfunded, is part of CalPERS while the City maintains an independent pension system, and PEPRA provisions are not consistent with the mandates of Section 1111 of the City Charter. The City is correct and the Arbitration Board will not consider the provisions of PEPRA.

As noted above, an arbitration hearing before the panel was held on May 13, 2014. The parties agreed to proceed on the pre-trial briefs and documentary evidence without producing live testimony. Documentary evidence was introduced

by stipulation and the parties argued the matter.

Counsel for both parties made opening statements that summarized the exhibits offered in support of the parties' last offers. Mr. Kahn discussed the history of the amendments to the City Charter and the history of negotiations between the City and its eleven labor groups. The Union is the only employee group that has not agreed to a Tier 2 retirement benefit. Pursuant to Section 1111 of the City Charter, the primary factors to be considered by the Arbitration Board in reaching its award are the City's financial condition and the City's labor contracts with its other bargaining units. Mr. Kahn contends that many of the City's proposals represented the maximum allowed benefit under Charter Article XV-A, therefore the Arbitration Board need not apply the Section 1111 criteria to these proposals as the proposals constitute the Charters maximums. Mr. Kahn further explained that, with respect to benefits for which Measure B does not set a maximum, the City's last offer to IAFF Local 230 was identical to the terms agreed to between the City and the SJPOA, and richer than those that were approved by the City Council for the City's non-sworn bargaining units. He contends that this fact is critical given the weight placed on the City's agreements with other bargaining units pursuant to Section 1111(f) of the Charter.

Christopher Platten described the Union's continued opposition to Measure B and the steps IAFF, Local 230 has taken, and will continue to take, outside of this arbitration to invalidate Measure B. Mr. Platten further explained IAFF Local 230's opposition to the City's last offer received prior to the Arbitration, arguing that the proposed Tier 2 retirement plan would render the City a non-competitive employer

as compared to jurisdictions offering retirement benefits consistent with the Public Employees' Pension Retirement Act. In addition, the benefits being offered were "illusory" because the City was proposing as part of its last offer that none of the Tier 2 retirement benefits be vested, meaning they could be eliminated either prospectively or retroactively.

Following opening statements, the parties agreed to a list of the issues to be decided by the Arbitration Board and deadlines for submission of (i) last offers, (ii) post-hearing briefs and (iii) reply briefs. The parties' last and final offers were submitted on May 20, 2014.

After closure of the arbitration hearing, both parties sought to introduce further evidence. By agreement, Union Exhibit 17, a May 16, 2014 memo from Bolton Partners to Mr. Platten and City Exhibit 47, a May 28, 2014 letter from Bartel Associates to David Kahn, will be admitted. The Union asks the arbitrators to read the August 2014 memos from Councilman Don Rocha in its reply brief. These memos were not received in evidence and will not be considered in this decision. They are excluded from the record in this arbitration.

The San José Charter provides for "issue by issue" and "last offer" interest arbitration. Under this system, each party submits a last offer of settlement on each of the issues in dispute at the conclusion of the arbitration hearings. (San José Charter Section 1111(e).) This Arbitration Board then votes separately on each issue, selecting the last offer of settlement that most closely meets the criteria specified in the Charter.

ISSUE

Should the Arbitration Board adopt the last offer of the City of San Jose or the International Association of Firefighters?

Many of the Union and the City's final proposals match. The City's offer and the Union stipulate to adoption of the following issues:

Issue 2: Implementation of Tier 2 Retirement Benefits (the San Jose Municipal Code and retirement plan documents shall be amended to reflect the terms of the award.)

Issue 3: Purchase of Service Credit (Tier 2 employees are not eligible for purchase of service credit, other than military leave.)

Issue 4: Defined Contribution Plan (Employees may supplement the retirement benefit they receive by electing to make contributions to a defined contribution plan offered by the City, up to the annual IRS limit.)

Issue 5: Reciprocity (Employees are eligible for reciprocity on retirement plans based on the terms of the City's reciprocal agreement with CalPERS, and that service in a reciprocal agency may not be used to qualify for an unreduced early retirement.)

Issue 8: Return of Contributions (If a Tier 2 employee leaves City service, as an alternative to receiving a pension benefit, the employee shall have the option of taking a return of the employee's contributions.)

Issue 9: Redeposit of Contributions (Tier 2 employees who are the subject of a City lay-off and receive a return of retirement contributions are eligible to redeposit their contributions within 90 days of being rehired or reinstated by the City.)

As to the remaining issues, there is a disagreement between the parties.

AWARD ON CONTESTED ISSUES AND APPROVAL OF UNCONTESTED ISSUES

This Interest Arbitration Board has limited power. The Board's Award must comply with the City of San Jose's Charter limitations which prohibit exceeding the maximum Tier 2 benefit levels allowed under Section 1508-A. In addition, section

1111 (f) of the City Charter states that the Board's primary factor in its award shall be the City's financial condition and the City's ability to pay for the retirement benefits from ongoing revenues without reducing City services. The Arbitration Board shall also consider the rate of increase or decrease of compensation approved for other bargaining units.

ISSUE 1: TIER 2 RETIREMENT BENEFITS

The first issue of Tier 2 benefits is to be considered as a single issue, with a number of component benefits with economic impacts, including Pension Formula, Final Compensation, Minimum Service, Retirement Service Credit, Age, Deferral of Retirement, COLA, Disability Retirements, Survivorship Benefits, and Cost Sharing. The Arbitration Board must award the City's, or IAFF Local 230's, last offer on Issue 1 as a whole on all these topics.

On March 19, 2013, Deputy City Manager Alex Gurza, who is also the City's appointed Arbitration Board member in this Arbitration, wrote a memorandum that was made part of the record. The memorandum updated the Mayor and City Council regarding the independent Retirement Board's actuarial reports from its actuary, Cheiron, about the figures that would be used to establish appropriate 2013-2014 contribution rates for the City and its employees for benefits. A \$2.9 billion unfunded liability was reported from the pension and retiree healthcare plans for all City employees. Included in that figure is an unfunded liability for police and firefighter's pension of \$694.3 million and for healthcare benefits of \$529.839 million. Ten months later on January 7, 2014, Cheiron produced another report for the fiscal year ending June 30, 2012. From 2012 to 2013, the Unfunded

Actuarial Liability associated with the Police and Fire Retirement Plan increased slightly over 16%, from \$694.3 million to \$806.1 million, for an unfunded net pension liability of \$788.5 million. A couple of days later on January 29, 2014, Cheiron also provided a report on the Police and Fire fighters Medical and Dental Retirement benefits for the fiscal year ended June 30, 2013. The Unfunded Actuarial Liability for only the Fire Department medical and dental benefits is \$166,423,078; for the police, it is another \$270,541,227.

The City and the Union each submitted expert opinions through exhibits, which were made part of the record. The City's expert is John Bartel of Bartel Associates. The Union's expert is Tom Lowman from Bolton Partners. He calculated that the IAFF Local 230 proposals for improvements to the City's proposal "to be 1.7% of total Tier 2 payroll". He further pointed out that since "(t)he city bears only half of those costs, so the incremental cost to the city is 0.85% of pensionable payroll, or 0.75% of total payroll". Mr. Bartel acknowledges that Mr. Lowman's estimate of a 1.7% increase in costs for the proposals of IAFF Local 230 seems reasonable.

Issue 1 contains many sub-issues, many of which the parties agree upon. Therefore, issues regarding Pension Formula, Final Compensation, Minimum Service, Retirement Service Credit, Age, Deferral of Retirement and Cost Sharing need not be discussed because there is agreement. There are minor differences in the wording in Pension Formula and Final Compensation issues that do not appear to affect the meaning of the provisions. The City's proposed language should be adopted as it conforms to the language used in the San Jose Police Officer

Association's (the other public safety bargaining groups) agreement for the sake of simplicity. The parties disagree on Disability Benefits and Survivorship benefits.

City's position

The City experienced \$670 million dollars of shortfalls between 2002 and 2013 in its General Fund, from which fire fighters salaries and benefits are primarily paid. A major factor in this shortfall is the rising cost of retirement and health benefits for City employees, including firefighters; the City's costs for retirement benefits for the Police and Fire Department Retirement Plan increased by approximately 385% from Fiscal Year 2003-2004 to Fiscal Year 2013-2014, despite the total number of budgeted positions in the City decreasing by approximately 22% during that same time frame. Between the 2003-04 and 2013-14 fiscal years, the City cut approximately 1,570 positions due to service reductions and layoffs, and drastically reduced City services to its residents, notwithstanding significant wage concessions received from all City employees, including IAFF Local 230.

Bargaining proposals or last-and-final offers from both the City and IAFF Local 230 cannot violate the maximum benefit levels in Section 1508-A of the City Charter. The Union's last and final proposals violate the San Jose City Charter, give more favorable benefits to fire fighters than other employees of San Jose and even their own expert acknowledges will increase the City's costs.

Union's position

The Arbitration Board must examine those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, and other terms and conditions of similarly

employed personnel and the financial condition of the City and its ability to meet the cost of the award. As discussed above, PEPRA's benefits are "higher than afforded San Jose 'Tier 2' fire fighters under Measure B" and establish the labor market conditions for pension benefits for newly hired fire fighters for the vast bulk of public agencies within California especially as to disability retirement. There is a "horrendous disparity" between Measure B restrictions and those provided under PEPRA.

The City has negatively impacted its capacity to recruit and retain highly qualified fire fighters through the implementation of Measure B. Tier 2 provisions puts San Jose in a non competitive position because the benefits offered by other agencies are superior.

The Union also points out that changes to disability provisions have been stayed and the City wants to negotiate regarding disabled safety workers; at least one council member who supported Measure B has renounced the Charter changes as detrimental to San Jose; and the Mercury News recognizes the inequities of Measure B.

The Union challenges the legality of Measure B and questions San Jose's unfair labor practices as alleged in the proceedings before the PERB. The Union also notes that if the PERB invalidates Measure B then the Arbitration Board's decision has no effect.

In addition, as to disability retirements and survivorship benefits, there is no component of Measure B that limits these benefits. Therefore, these benefits proposed by the Union, that are only slightly modified from the San Jose Police

Officer's Association (SJPOA) benefits, should be adopted.

Arbitration Board

The Arbitration Board is restricted to the parameters as set forth in Charter Section 1111 which provides that the primary factors to be considered by the Arbitration Board in reaching its award are the City's financial condition and the City's labor contracts with its other bargaining units and Section 1504-A which provides that no "arbitrator appointed pursuant to Charter Section 1111, shall have the authority to agree to or provide any increase in pension and/or retiree health care benefits without voter approval...". In short, the Arbitration Board cannot improve the benefits for fire fighters that are contrary to the City Charter because the City Charter controls. *Creighton v. City of Santa Monica, supra*.

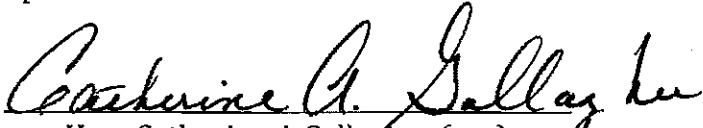
In the IAFF Local 230's actuarial report, its survivorship benefit proposal would increase the normal cost of the Tier 2 retirement plan by 1.4% to the City and employees. Similarly, the Union's proposal on disability benefits would increase the normal cost of the Tier 2 retirement plan by 0.30%, to be split equally between the City and employees. In total, IAGG Local 230 proposals would increase the cost of the benefits by 1.7%. Any increase without voter approval is prohibited by the City Charter.

PEPRA is not applicable to San Jose. The City has an independent pension plan and PEPRA is significantly unfunded. It is a part of CalPERS, a separate retirement system; and PEPRA provisions are not consistent with the mandates of Section 1111 of the City Charter. Accordingly, the Arbitration Board will not consider the provisions of PEPRA.

The provisions the Union proposals might make San Jose more competitive in recruiting new employees, but they will increase the City's cost and are more generous than the benefits received by other employee groups.


Therefore, the City proposal is adopted.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

☐ Concur

☒ Dissent


Joel Phelan, IAFF, Local 230 Board Member

☒ Concur

☐ Dissent

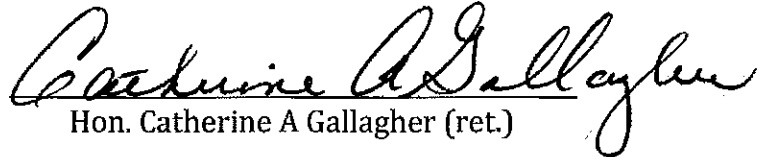

Alex Gurza, City Board Member

ISSUE 2: IMPLEMENTATION OF TIER 2 RETIREMENT BENEFITS

As soon as is feasible following entry of an award by the Board, the San Jose Municipal Code and applicable plan documents shall be amended to reflect the terms of this agreement.

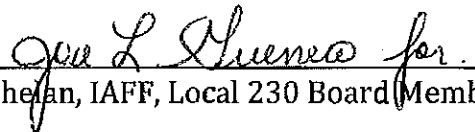
This proposal is adopted by agreement of the parties.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

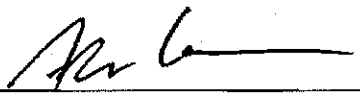
☒ Concur

☐ Dissent


Joel Pheasant, IAFF, Local 230 Board Member

☒ Concur

☐ Dissent

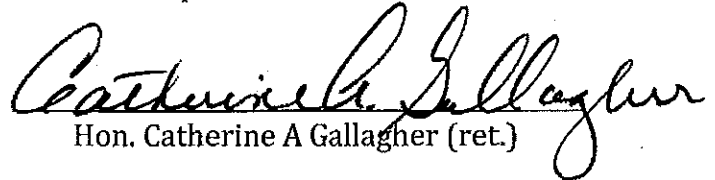

Alex Gurza, City Board Member

ISSUE 3: PURCHASE OF SERVICE CREDIT

Tier 2 employees will not be eligible for any purchase of service credit, other than for military leave.

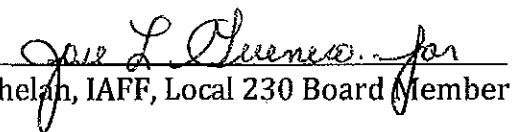
This proposal is adopted by agreement of the parties.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

X Concur

 Dissent


Joel Phelan, IAFF, Local 230 Board Member

X Concur

 Dissent

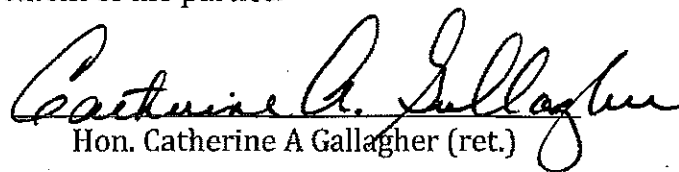

Alex Gurza, City Board Member

ISSUE 4: DEFINED CONTRIBUTION PLAN

Employees may supplement the retirement benefit by electing to make contributions to a defined contribution plan offered by the City, up to the annual IRS limit.

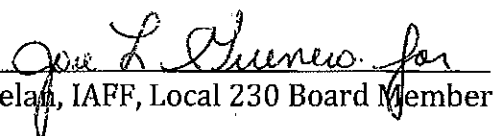
This proposal is adopted by agreement of the parties.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

☒ Concur

☐ Dissent


Joel Phelan, IAFF, Local 230 Board Member

☒ Concur

☐ Dissent

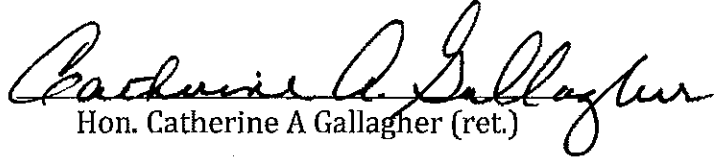

Alex Gurza, City Board Member

ISSUE 5: RECIPROCITY

Employees shall be eligible for reciprocity per the terms of the City's reciprocal agreement with CalPERS. In no event shall service in a reciprocal agency be used to qualify for an unreduced early retirement.

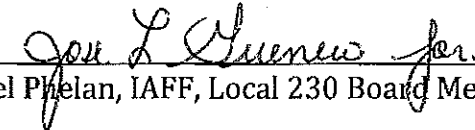
This proposal is adopted by agreement of the parties.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

☒ Concur

☐ Dissent


Joel Phelan, IAFF, Local 230 Board Member

☒ Concur

☐ Dissent


Alex Gurza, City Board Member

ISSUE 6: IRS REVIEW

This issue concerns IRS approval of the Tier 2 Plan as a “qualified retirement plan” for tax-deferral purposes.

City's last and final offer

Based on information from the City's tax advisors, the City believes the Second Tier Plan is part of a qualified retirement plan under IRS regulations (along with First Tier). However, if the IRS determines that the Second Tier Plan does not meet the requirements of a qualified plan, the City and IAFF Local 230 shall meet and confer over plan modifications, which are within the scope of representation, required to obtain a qualified plan determination or private letter ruling from the IRS.

Union's last and final

The City asserts that the Tier 2 plan is part of a qualified retirement plan under IRS regulations (along with Tier 1). However, if the IRS determines that the Tier 2 Plan does not meet the requirements of a qualified plan, Local 230 and the City agree to meet and confer over plan modifications, which are within the scope of representation, required to obtain a qualified plan determination or private letter ruling from the IRS. Such modifications should not materially impact member benefits, but if they do, any reduction in benefit shall be offset by a comparable benefit provided such offsets are within the limits set by Measure B.

City's position

The City previously obtained a favorable determination letter from the IRS for the Federated City Employees Retirement System Plan, which is similar to the

SJPOA and proposed IAFF Local 230 Tier 2 plan. (City Ex. 11, p. 1-2) The City believes, based on advice from its tax advisors, that the Tier 2 retirement benefit plan as adopted for SJPOA and proposed for IAFF Local 230 is a “qualified retirement plan” under IRS regulations. Nonetheless, the City’s last offer is that if the IRS determines that the Tier 2 Plan is not a qualified retirement plan, the City will meet and confer on plan modifications required to obtain a qualified plan ruling from the IRS.

Union’s Position

IAFF Local 230’s Post Hearing Brief urges the Arbitrators to include a provision that any modification should not materially impact member benefits or that increasing another benefit within Measure B shall offset any reduction in benefit limits. The Union’s position is that if the IRS rules the plan invalid, then Tier 2 fire fighters automatically revert to Tier 1 employees.


Arbitration Board

IAFF Local 230’s language on what should happen in the event of an adverse IRS ruling is not necessary, as the City’s language provides for negotiating any modifications to the plan. An offset of any reduction in benefits required to address IRS concerns is certainly an appropriate subject of negotiations, but should not be mandated, and probably cannot be mandated, by the Arbitration Board, which as noted by the City and Union does not have plenary powers over all labor issues between the parties. Neither should the firefighters be automatically included in Tier 1 benefits. This might be the result of the PERB or Court ruling, but this Arbitration Board cannot determine the applicable law should Measure B be

invalidated. The fiscal impact of the Union's proposal has not been proven and the firefighters should not be treated in a manner that differs from the SJPOA provisions for IRS review on the same Tier 2 Plan. The Arbitration Board is mandated by Section 1111 of the San Jose Charter to consider benefits given to other employee groups. If the Arbitration Board adopted the Union's proposal, the benefits to the firefighters would be more advantageous than provided other City employees.

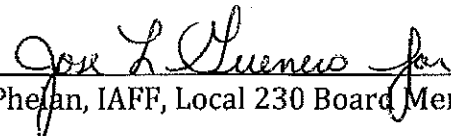
The City proposal is adopted.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

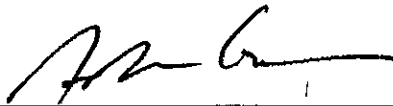
☐ Concur

☒ Dissent


Joel Pheasant, IAFF, Local 230 Board Member

☒ Concur

☐ Dissent


Alex Gurza, City Board Member

ISSUE 7: TIER 1 PROVISIONS

The discussion of this issue involves the City's proposal for Issue 7 and part of the introduction to Issue 1 as well as a different introduction proposed by the Union.

City's proposal to Issue 7

The retirement benefits for employees in Tier 2 are limited to those specifically defined in this award and set forth in the City Charter. Employees in Tier 2 shall not be eligible to receive, or be subject to, the benefits available under Tier 1, unless implemented as a result of the negotiation process and/or applicable impasse procedures.

City's suggested introduction in Issue 1

Effective as soon as possible after entry of an award by the Board of Arbitrators (the "Board") presiding over JAMS Reference No. 110016479 between the City of San José and International Association of Fire Fighters Local 230, the City shall implement a second tier of retirement benefits consisting of the terms listed below. Employees who enter the Police and Fire Department Retirement Plan after the implementation of Tier 2 will be subject to Tier 2 retirement benefits.

Union's suggested language

Effective as soon as possible, the City shall implement a second tier retirement benefit consisting of the terms of the current tier one pension benefit, with the following reductions, restrictions or new definitions. Employees represented by Local 230 who enter the Police and Fire Department Retirement

Plan after the implementation of the second tier will be part of the second tier benefits.

City's position

The purpose of this interest arbitration is to identify what the Tier 2 benefits would be and to provide a complete award of benefits. The City has proposed that Tier 2 benefits be limited to those identified in this Board's award and the City Charter, whereas the Union has proposed that Tier 2 employees be eligible for all Tier 1 benefits except as modified by the Board's award without identifying what Tier 1 benefits are to apply to Tier 2 employees.

The purpose of this arbitration is to specifically identify the parameters for Tier 2 retirement benefits. The Union has refused to identify which Tier 1 provisions it wanted included as part of Tier 2. Adopting the Union's proposal would result in uncertainty with respect to Tier 2.

Union's position

Any provisions regarding Tier 1 retirement benefits not included in the City's proposal for Tier 2 employees will be automatically included in the Tier 2 package of benefits.

The City sponsored provision sets forth preclusive language not contained in Measure B; this is an attempt by the City to limit bargaining over Tier 2 benefits in the future if Measure B is invalidated. The Arbitration Board may not preclude any potential remedy by PERB, or a reviewing court, if Measure B is invalidated, including the potential remedy that members of IAFF, Local 230 be deemed Tier 1 employees of the City of San Jose. The Union expressly objects to the Arbitration

Board deciding the Arbitrator's authority or jurisdiction to entertain the City's proposal on this issue since it exceeds her authority under Charter Section 1111.

The Union asks the Arbitration Board to decline the City's proposal since it exceeds the Board's authority under Section 1111 of the City Charter.

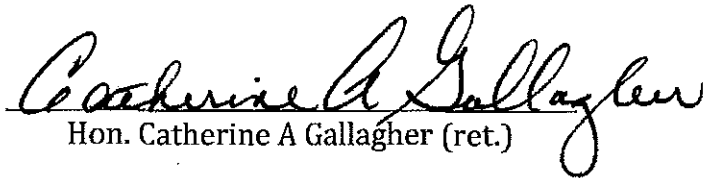
Arbitration Board

There is a difference of interpretation as to the meaning of Issue 7 proposals. Should a California Court or PERB invalidate the two-tiered benefit system, Measure B will not have any effect. The fire fighters and all other City of San Jose unions will go back to the bargaining table. This Arbitration Board cannot dictate the outcome of those negotiations; nor can the Board dictate that Tier 1 benefits will automatically be reinstated. As noted earlier, the Arbitration Board's powers are not absolute. If a court or PERB invalidates Measure B, the parties will negotiate or be subject to court orders or PERB orders. This Arbitration Board has no jurisdiction to limit a Court or any appropriate governmental body such as the PERB.

As to the terms to be included in the present agreement between the City of San Jose and the Union, the City's proposed language will be adopted subject to any further court rulings or decision adverse to Measure B by a governmental agency such as PERB.


The City proposal is adopted.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

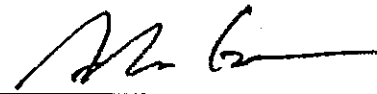
_____ Concur

X Dissent


Joel Phelan, IAFF, Local 230 Board Member

X Concur

_____ Dissent

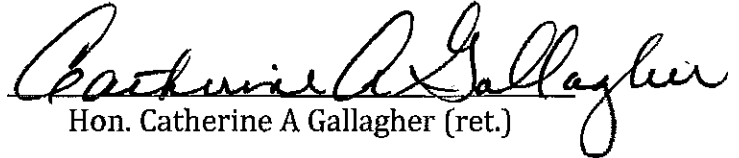

Alex Gurza, City Board Member

ISSUE 8: RETURN OF CONTRIBUTIONS

If a Tier 2 employee leaves City service, as an alternative to receiving a pension benefit, the employee shall have the option of taking a return of the employee's contributions.


This proposal is adopted by agreement of the parties.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

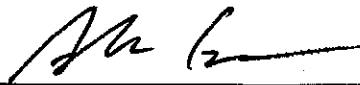
X Concur

 Dissent


Joel Phefan, IAFF, Local 230 Board Member

X Concur

 Dissent



Alex Gurza, City Board Member

ISSUE 9: REDEPOSIT OF CONTRIBUTIONS

Employees in Tier 2 who are subject of a layoff by the City and received a return of contributions will be eligible to redeposit their contributions within 90 days of a reinstatement or rehire by the City of San Jose.

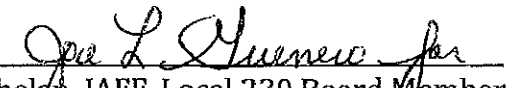
This proposal is adopted by agreement of the parties.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

☒ Concur

☐ Dissent


Joel Phelan, IAFF, Local 230 Board Member

☒ Concur

☐ Dissent


Alex Gurza, City Board Member

ISSUE 10: RETIREE HEALTH BENEFITS

City's last and final

Employees hired into full-time benefited positions represented by IAFF Local 230 on or after the first pay period following the effective date of the ordinance implementing this provision ("Effective Date") will not participate in or be eligible for the defined benefit retiree healthcare program. The City will pay the unfunded liability contribution that these employees and the City would have otherwise paid had they gone into the retiree healthcare defined benefit program.

Union's last and final

The members of Tier 2 shall participate in the same post employment healthcare and dental benefit program as Tier 1 members, with the same benefit and contribution.

City's position

The City proposes that Tier 2 employees not participate in or be eligible for the defined benefit retiree healthcare program. The City calculates that if Tier 2 employees are eligible for retiree health benefits, these employees will be compelled to pay nearly 9% (or more as contribution rates for retiree health are likely to continue to increase) of their pay (same as Tier 1 members) towards retiree healthcare while only receiving the benefits for, at most, five years versus fifteen years for Tier 1 members. By virtue of the difference in retirement age for Tier 1 and Tier 2 employees, retiree medical benefits are significantly more valuable to Tier 1 employees than Tier 2 employees.

Under the City's Tier 1 retirement system, employees may retire as early as

age 50, meaning that Tier 1 employees would be eligible to receive retiree medical care for as many as 15 years prior to becoming Medicare eligible. Under Tier 2, however, employees are not eligible for retirement until age 60 and therefore would only be eligible to receive retiree medical benefits for 5 years prior to Medicare eligibility. Balancing the significant cost to employees against the limited benefit of retiree health coverage for Tier 2 employees, the City submits that it is not in either the City's or the employees' interest to maintain retiree health benefits. Should the Board adopt the City's proposal as its award, Tier 2 employees would see a substantial increase in their take-home pay in exchange for a minimal reduction in benefits.

Union's position

The Union proposes that Tier 2 fire fighters participate in the same retiree healthcare benefits as afforded to SJPOA Tier 2 employees. There is no evidence supporting a differential in treatment between Tier 2 fire fighters and Tier 2 police officers in connection with retiree health benefits. San Jose City Charter 1111 provides that the Arbitration Board must give substantial weight to the benefits afforded to other bargaining units. In addition, prior to this interest arbitration, the City proposed that the Union Tier 2 employees receive the same retiree healthcare benefits as received by the SJPOA.

Under the City's proposal, it promises to continue to pay that portion of the Unfunded Actuarially Accrued Liability (UAAL) that the Tier 2 fire fighters would have paid, if covered under the Tier 1 retiree healthcare plan. Therefore, the costs will not change or increase if the Tier 2 employees are afforded retiree health care

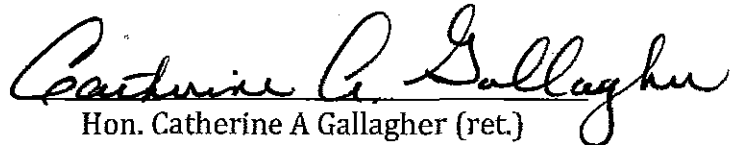
benefits.

Arbitration Board

Again the Arbitration Board is constrained by the provisions of the City Charter. This Board must consider the financial implications of its decisions as well as consider benefits afforded other City employees. The SJPOA is the only other San Jose bargaining unit directly involved in public safety so it is the best comparable unit. There is no additional cost to the City in connection with providing the Union Tier 2 members with retiree healthcare benefits and they should be afforded the same benefits received by the SJPOA Tier 2 employees. The Tier 2 fire fighters should have a retiree healthcare plan.


The Union's proposal is adopted.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

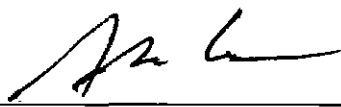
☒ Concur

☐ Dissent


Joel Phelan, IAFF, Local 230 Board Member

☐ Concur

☒ Dissent


Alex Gurza, City Board Member

ISSUE# 11: MEET AND CONFER ON TIER 2 RETIREMENT BENEFITS

City's proposal

If there is a voter-approved modification to Measure B Tier 2 benefits subsequent to implementation of this award, Tier 2 retirement benefits shall be subject to a reopener of negotiations and the parties shall immediately schedule and begin negotiations over Tier 2 retirement benefits.

If a court of competent jurisdiction issues a final decision (not subject to appeal) which sets aside the portion of Article XV of the City Charter dealing with second tier retirement benefits, the parties shall immediately begin negotiating over second tier retirement benefits.

Union's proposal

If a court issues a final decision (not subject to appeal), or if the PERB issues a ruling which sets aside portions of Measure B with second tier retirement benefits, the parties shall immediately begin negotiating over second tier retirement benefits. All current members of Tier 2 will become Tier 1 members and such new Tier 2 plan developed through such negotiations will apply to future hires.

City's position

If Measure B is invalid then the parties should negotiate. Tier 2 employees should not automatically obtain Tier 1 benefits.

Union's position

If Measure B is invalid then Tier 2 employees should automatically obtain Tier 1 Benefits.

Arbitration discussion

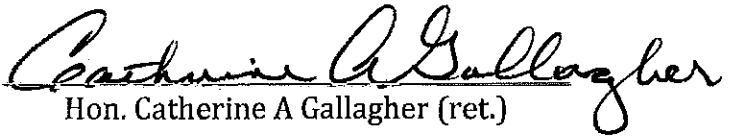
The Union stipulates to the first paragraph of the City's offer but proposes significant changes to the second paragraph. Negotiations with the Union have been protracted and the issues involving Measure B are being litigated in several venues over a long period of time. Whatever decisions are rendered in any other forum, the matter will be undoubtedly be appealed.

If the Union's proposal is adopted, and it is successful at PERB, all Tier 2 fire fighters employed at that time would automatically become Tier 1 employees. This would mean that negotiations would only involve new hires. While the invalidation of Measure B might result in all Tier 2 employees automatically obtaining Tier 1 benefits, it may not. As a result, this decision must be made at the time there is actually a change in the law and circumstances. This is not a decision that should be made by this Arbitration Board. In addition, the Union's proposal is inconsistent with the criteria in Section 1111 of the City Charter and would increase the unfunded liability for the city. Moreover, there is no evidence that any other union has this provision.

Of course, this Arbitration Board has no power to order a court or the PERB to adopt a particular remedy in deciding a case within their jurisdiction. The fire fighters are concerned that the Arbitration Board might "delimit the impact of a make -whole remedy" issued by a Court or other governmental agency. This Arbitration Board does not have such power. This Board recognizes that PERB will make an independent decision on Measure B and that this Arbitration Board has no jurisdiction over PERB or a court of law.

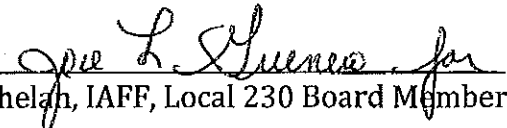
The City's proposal will be adopted.

September 12, 2014


Hon. Catherine A Gallagher (ret.)

☐ Concur

☒ Dissent


Joel Phelan, IAFF, Local 230 Board Member

☒ Concur

☐ Dissent


Alex Gurza, City Board Member

**Concurring and Dissenting Opinion of Arbitration Board Member Joel Phelan
on Issue #1: Tier 2 Retirement Benefits; Issue #6: IRS Review; Issue #11 Meet
and Confer on Tier 2 Retirement Benefits**

I write separately to emphasize two points made in the Chair's Opinion to which I concur and to briefly state why I dissent from the Chair's Opinion concerning Issues Nos. 1, 6 and 11.

The Chair's Opinion correctly states that without exception the Union has reserved all arguments over the validity of Measure B to determination by the PERB and any other further court rulings. This is as it should be. Thus, I concur with the Chair's view that the terms awarded by this arbitration decision are subject to any further court rulings or decision adverse to Measure B by a governmental agency such as PERB.

Moreover, I concur with the Chair's view that the San Jose Police Officers Association is the only other San Jose bargaining unit directly involved in public safety so it is the best comparable unit of employees under the charter's arbitration provisions.

I part company with the Chair, however, with respect to specific determinations as to Issues Nos. 1, 6 and 11.

I note first that Measure B, conceived from a canard that the City would experience exponential increases in post-retirement benefit costs of \$650 million by Fiscal Year 2016, permanently locks the City into a non-competitive position relative to all other California municipal agencies regarding pension and retiree health benefits. This handcuff, a reactive austerity driven political gambit, ensures that San Jose will not attract the best and brightest into public safety jobs that grow

increasingly dangerous and sophisticated by the day. Few qualified people are likely to seek employment in the ultra-hazardous occupation of firefighter when, as required by Measure B, a disabling incident results in a permanent loss of income because of the absence of a meaningful disability retirement benefit. All other municipal fire agencies in California provide an occupationally defined disability benefit for firefighters --- but not San Jose. It bears repeating therefore to remember that for decades, San Jose has provided first rate fire and emergency medical service to the citizens of the 10th largest city in America with the fewest number of firefighters per thousand residents of any major metropolis in the country. Because of Measure B, San Jose will simply no longer attract the same generous pool of innovative, skilled and dedicated firefighters that have so far overcome gross staffing deficiencies in order to provide basic life and property saving services.

It is therefore appropriate to dissent from the Chair's decision to adopt the City's final proposal on Issue No. 1 regarding Tier 2 benefits. For the City's final proposal, unlike that of the Union, imposes several significant reductions in benefits to Tier 2 employees not otherwise called for under Measure B. As was more artfully explained in the Union's briefing on this issue, there is no justification for imposing limits on benefits beyond those required by Measure B. Therefore, I dissent from the Chair's award of the City's final proposal on this issue. I do note, however, that the City has stated that the intent of its proposal is to guarantee provision of the annual COLA, and will provide written confirmation to that effect.

I agree with the decision that this Arbitration Board cannot improve the benefits for firefighters in a way that is contrary to the charter where the charter sets specific controls or limits. I disagree, however, with the Chair's opinion that the Union's proposal is a cost increase prohibited under the charter. Currently,

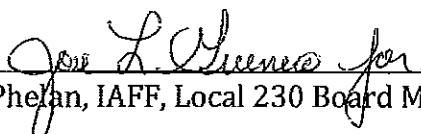
there is no "Tier 2" plan for Union represented employees, and so the creation of a new Tier 2 plan cannot possibly be an increase over an existing cost. Therefore, voter approval is not required to implement the Union's proposal, since it otherwise complies with the Tier 2 limits under Measure B. At the minimum, the Union's offer provides a significant decrease over existing Tier 1 costs, well within all Measure B/charter Tier 2 limits. This much is certain since the City itself adopted a level of benefits for POA represented Plan members that exceeds the Tier 2 benefits provided to other City unions representing non-safety employees.

Similarly, I dissent from the Chair's award of the City's final proposal on Issue No. 6. If the IRS disqualifies the Tier 2 plan, it disqualifies the only plan established by Measure B. And at disqualification, existing Tier 2 fire fighters as Retirement Plan participants, automatically fall into the only other existing plan benefit – i.e., Tier 1.

Finally, for the same reason, I dissent from the Chair's award of the City's final proposal on Issue No. 11. If Measure B is invalidated, Tier 2 participants become covered under the pre-existing Plan benefits – Tier 1.

For all of these reasons, and those more thoroughly set forth in the record and briefings, I concur and dissent from the Chair's Opinion .

September 12, 2014


Joel Pheasant, IAFF, Local 230 Board Member

Dissenting Opinion of Arbitration Board Member Alex Gurza on Issue #10:

Retiree Health Benefits

I appreciate my fellow Arbitration Board members' consideration of **Issue 10: Retiree Health Benefits** and respectfully dissent. As summarized in the Award, the retiree healthcare program currently offered by the City to its Tier 1 employees has substantially less value to Tier 2 employees given the shorter time period between when a Tier 2 employee is eligible to retire and when they will be eligible for Medicare. The City's offer was based on the cost to a Tier 2 employee of being in the retiree healthcare program, which would be the same as Tier 1 employees but with a much shorter time period that they would receive the benefit. As of June 22, 2014, employees represented by IAFF Local 230 are required to contribute 8.49% of their pay for this benefit, and the contributions to retiree healthcare are likely to increase over time.

The City's proposal, if adopted, would have increased a Tier 2 employee's net pay by 8.49% in exchange for not participating in a program with limited benefit to a Tier 2 employee. It is true that the City's costs associated with allowing Tier 2 employees to participate in the retiree healthcare program does not create an additional cost beyond the cost for Tier 1 retiree healthcare benefits, but the City's offer was for the purpose of increasing the net pay of Tier 2 employees by 8.49% by forgoing a benefit that has less value than it does for a Tier 1 employee.

Since the Arbitration Board majority did not select the City's last offer, the City and IAFF Local 230 will need to work together on this issue in contract negotiations.

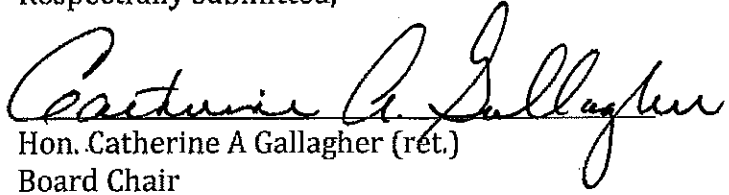
Closing

Charter Section 1111(i) provides that the decision of the Arbitration Board shall not be publicly disclosed and shall not be binding until ten days after it is delivered to the parties. During that period (or any agreed upon extensions), the parties may meet privately to attempt to resolve their differences and amend or modify any of the decisions of the Arbitration Board. At the end of this period, the Arbitration Board decision with any agreed upon amendments or modifications, will be made public and shall be binding on the parties.

Compromise on both sides is always the goal in negotiations. The 10-day period of private disclosure of this award affords the parties another opportunity to resolve this long standing dispute. Hopefully, it will be fruitful.

Respectfully submitted,

September 12, 2014


Hon. Catherine A Gallagher (ret.)
Board Chair

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: City of San Jose vs. IAFF Local Union 230
Reference No. 1110016479

I, Lisa Midel, not a party to the within action, hereby declare that on September 12, 2014 I served the attached **Decision and Award of Arbitration Board** on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at San Jose, CALIFORNIA, addressed as follows:


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Parties Represented:

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Jose,
CALIFORNIA on September 12, 2014.



Lisa Midel
lmidel@jamsadr.com